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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 69

FRED L. FOX, IN HIS INDIVIDUAL RIGHT AND IN HIS OFFICIAL CAPACITY AS TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA, *Appellant*,

v.

STANDARD OIL COMPANY OF NEW JERSEY, *Appellee.*

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

FOREWORD

Many of the arguments advanced in appellee's brief were anticipated and met by appellant's original brief. There are, however, a number of assertions made in appellee's brief which it is believed justify the filing of this reply brief in answer thereto or in explanation thereof. This will be done rather categorically by

referring to the pages of appellee's brief on which the subject-matter is found.

ARGUMENT

The Showing of Appellee's Affiliates

The statements found on pages 4 and 6 of appellee's brief might carry the suggestion that appellee gave, and the record shows, the activities of appellee's affiliates, except those operating in other parts of the world. Such is not the case. Doubtless many of the foreign activities of appellee's affiliates would be unrelated to appellee's West Virginia business. Appellee declined to give the information which would have enabled the court to determine the relevancy of the information requested of appellee by appellant. But this is not all, appellee refused to show pertinent facts relating to companies admittedly related to appellee's West Virginia business, and refused to give full information concerning the production and transportation of even the very crude petroleum which was used in the West Virginia business. It is appellant's position that appellee, if it would show confiscation, was, in view of the allegations of the answer and amended answer, required to make a full showing. This full showing it refused to make, not because the questions or inquiries were too broad, but because appellee insisted that other information was irrelevant, even though it be concerning the production or transportation of the very crude oil which was refined and distributed in West Virginia, because not related to the *marketing business* in West Virginia. See discussion in appellant's original brief, pages 38 to 46, inclusive, wherein in many particulars it is pointed out that most pertinent information was not disclosed by appellee.

Independent Dealer Stations

In appellee's brief, pages 7 and 18, it is stated that the organization of appellee's system of stations does not interfere with or tend to eliminate the business of single station operators, and references are made to the respective opinions of Judges Soper and Chesnut (R. 259, 267). It is obvious that this conclusion is unfounded. In the same opinion (R. 271) Judge Soper observed: "The possible volume of business for most of the stations is necessarily limited in amount." Can it be said that when the business is limited in amount the operation of 1003 Standard stations, or 2453 chain stations in all, as against 2000 independent stations, does not interfere with or tend to limit the operation of the individual stations? Still further (R. 49), 848 of appellee's stations are agency stations, meaning stations constructed and owned by other persons and thereafter leased by appellees, with the owner usually employed as the agent of appellee to operate same. Of necessity every such lease and agency is in itself the displacement of an individual dealer.

Closely related to this observation is the further observation made by the district court (R. 266-8) to the effect that the usual objections to other types of chain stores may not be raised against the filling station chains, for the reason that the filling stations are as much a pioneer of the new development in the automobile and petroleum industry as is the single station operator. The record does not sustain this observation. To the contrary, the record shows that the major gasoline companies launched into the extensive chain operation of filling stations only recently. The first agency station of appellee was not taken until January, 1930, (R. 169) after which appellee rapidly increased its agency stations, at one time to in excess of 848 stations, but to that number

at the time of the enactment of the tax statute herein involved, although appellee had operated a few company owned stations since 1922, but prior to 1927 less than fifty in number (R. 150). The other major companies inaugurated the agency station system at or about the same time, that is to say, 1930 (R. 197). And Judge Soper, in his opinion (R. 259), says that the establishment of such stations by oil companies of national scope "is a matter of comparatively recent date." It is a matter of common and general knowledge that the distribution of motor fuels and lubricants had been highly developed and had become very extensive prior to the year 1930, or even 1927.

Diminishing Returns

On page 18 of its brief appellee refers to the observation of Judge Soper (R. 254-5), that a large number of new stations "in excess say of 150 stations, has been accompanied by diminishing rather than increasing returns." It will be noted that Judge Soper's observation is made from the figures, appearing in the record, derived from the gallonage taxes collected in the State of West Virginia from 1927 to 1932, regardless of the character of the stations at which the gasoline was sold. These figures can suggest only one of two things, namely, that less gasoline has been consumed in recent years in West Virginia, or that the Standard company has sold a smaller percentage of the gasoline consumed in West Virginia. The figures on the gallonage tax would be identically the same, if the same amount of gasoline were sold, whether the same be sold through Standard stations or through individual dealers. The gasoline gallonage tax is not measured by what Standard sells at its own stations or agency stations, but by the whole gallonage sold by it in the state. If Standard did not

have a single filling station in the state, and more Standard gasoline were consumed in the state, the gallonage tax would thereby be increased. The record shows (R. 204) that the percentage which the consumption of Standard gasoline bears to the consumption of all gasoline in the State of West Virginia has steadily decreased since 1929, as well as the gallonage consumption. On the other hand, the record (R. 216) showing gross sales taxes, wholesale and retail, of the Gulf company shows that its volume of business has increased. Perhaps the diminishing returns of the Standard company are occasioned by the increased activity and business of the Gulf and other gasoline companies. Perhaps, also, were it not for the fact that the Standard company in recent years has had so many company and agency stations scattered throughout the State of West Virginia, its returns may have diminished even more, and the percentage of Standard gasoline consumed in West Virginia, as compared with the consumption of all brands consumed in West Virginia, might have been even more reduced.

From what information the learned judge concluded that the point of diminishing returns was reached in the one hundred and fiftieth station we are unable to ascertain. Certainly, there is nothing in the record to justify this figure. If that point be accepted as the point of diminishing returns, and the point of diminishing returns be determinative of this case, then the act in question would be valid as to Ashland Refining Company, which had only 95 stations (R. 143), and as to Sinclair Refining Company, which had only 94 stations (R. 143), even though each of said companies comes within the highest bracket of 75 stores or more, and would have been invalid as to appellee and the Gulf Refining Company, while, as a matter of fact, the opinion

of the learned judge held the act unconstitutional as applied to all filling stations.

Open Stock Goods

At page 18 of its brief appellee refers to the fact that independent dealers sell appellee's products. Of course, such independent dealers purchase said products from appellee and pay for the same at appellee's posted retail price less a stated discount, with respect to gasoline, ordinarily three cents below said posted price (R. 173), regardless of fluctuations in such price. That individual dealers may handle the same "open stock" goods which are handled by the chain stores does not place the chain stores and the individual stores in the same classification. This contention was presented without avail in the case of *Great A. & P. Tea Co.* v. *Maxwell,* the North Carolina case. (See record in *Great A. & P. Co.* v. *Maxwell,* page 60, and Appellant's brief therein, page 6).

Fixing of Retail Prices

In appellant's original brief (pages 42-3) it is shown that the distributors of gasoline in general maintain the same retail prices. Appellee in its brief (page 66) would contend that there is no concert of action between the distributors, and particularly refers to the fact that while the Gulf and Sinclair stipulations stated that those companies, singly or with others, posted prices, and it is further shown that the prices are uniform, the names of the others with whom said companies post prices is not given, and suggests that the others may have been mere affiliates of Gulf and Sinclair, respectively. The Ashland stipulation shows that the posted retail prices are designated by the larger companies (R. 295-6). There can be no mistake about which are the larger

companies in the State of West Virginia, and the record shows that Standard and Gulf are the two largest among them. Whether the companies act in concert or not, there is certainly sufficient showing in the record to sustain the conclusion that there is no competition as to price, however great the competition as to location of stations and other distributing factors may be.

Passing the Tax On

The appellee complains particularly (brief, page 38) that the taxes under the act in question may not be passed on by the gasoline companies to the consumer. It is not believed that the validity of the tax is dependent upon the ability of those upon whom it is imposed to pass it on to others. And yet, the statement that this tax may not be passed on is open to question. Certainly, under the conditions shown by the record to be existing, the tax can largely be passed on. The record shows beyond question that the retail price of the same grades of motor fuels of the various companies in the same localities are uniform. The record also shows that the sale of gasoline by the distributors to individual station operators is made on the basis of that uniform posted retail price, less certain specified discounts. If the posted price be fifteen cents, by way of illustration, and the discount three cents, then the distributor actually receives twelve cents. If that price be increased to seventeen cents the individual dealer receives no more, but the entire two cents increase goes to the distributor. The individual dealer's profits are not increased a fraction of a cent, but the gross receipts of the distributors are increased. The record shows that thus far there has been no cut-throat competition between gasoline distributors in the matter of prices, and if the gasoline distributors thus far have been able to main-

tain even prices the record shows no facts which would prevent their maintaining such even prices on a slightly higher level. The record also shows that prior to the enactment of the tax the business of appellee with respect to profits was somewhat more favorable than the other principal distributors, who had losses where appellee had small admitted profits (R. pages 215-224). Undoubtedly, these distributors whose experiences heretofore have been less favorable will be very willing to convert such minor differences as might exist between their store taxes and appellee's store taxes into reduced losses, or increased profits, rather than to attempt to utilize such small differences to enforce losses upon appellee, and increasing losses upon themselves. It has already been shown in appellant's original brief (p. 46) that if appellee did not discriminate in favor of its agents to the extent of one-half cent per gallon, as compared with the individual dealers, this difference would go a long way toward absorbing the tax.

On pages 76-77 of appellee's brief it is stated that the average store tax on all operators of more than one service station is three per cent of the gross revenue. Appellee contends that its store tax is 4.2 per cent of its gross revenue, and bases that percentage upon the figures given in the findings of fact by the trial court (R. 278), fixing the gross revenues of appellee at all gasoline stations at $6,428,701.00. It will be noted, however, that the table there referred to was calculated with the bulk plants excluded. The true gross revenues of appellee for 1932, less the gallonage tax, was $8,381,195.48, being the gross revenue shown by appellee, including bulk sales (R. 9), less the gallonage tax of $1,817,257.84. (See computation, Appellant's original brief, page 36). Appellee's percentage is thus 2.87 or slightly less than the average store tax on chain filling

stations shown by appellee. Certainly, appellee cannot complain of this slight variation of its percentage, which is less than the average percentage, and which is in its favor, under the rule of rough and ready application, which appellee apparently recognizes in its brief (page 81).

Stores

Appellee admits (Brief, pages 88-101), that gasoline and motor oil are merchandise. While appellee does not expressly admit the same to be *ordinary* merchandise, in attempting to reply to the showing of appellant's brief (pages 53-66), appellee does not undertake to show that what it admits to be merchandise is not ordinary merchandise. We therefore again urge that if it be admitted, and it cannot be denied, that gasoline and motor oils are merchandise, of necessity filling stations are embraced within the definition of "store" in the West Virginia Chain Store Act, Section 8 (R. 40).

At pages 111-12 of its brief appellee quotes from the opinion of the district court the illustration that hotels do not become stores merely because they may sell cigars or flowers, or perhaps other articles. We do not concede that if a hotel departs from the furnishing of lodging and meals, in principle and in reality hotel purposes, and actually within the hotel conducts a store for the sale of cigars and tobaccos, cosmetics, flowers, or any other articles of merchandise, it may not be required to pay the usual store tax. It is a matter of common knowledge that the hotels in selling tobaccos are required to pay the special tobacco taxes, and in selling liquors, pay the liquor taxes, and if in fact they operate stores, we know of no principle of law which exempts them from the store tax.

The Tax Commissioner's Construction

The West Virginia Chain Store Act vests its administration in the State Tax Commissioner (R. 38). The record shows that the construction placed upon the chain store act by the State Tax Commissioner was that it applied to filling stations and bulk plants (R. 46), and, in fact, the bill of complaint so avers (R. 4). If there be any doubt as to the proper construction of said act as including bulk plants and filling stations within the provisions of the act, the construction and interpretation of the Tax Commissioner should receive consideration.

> "Where a statute is of doubtful meaning the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous."
>
> *Brandon* v. *Board of Control,* 84 W. Va. 417 (Point 2, Syl.).

The rule is stated in Cooley's Constitutional Limitations, 8th Ed., Vol. 1, p. 147, as follows:

> "Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations and endeavored to keep within the letter and the spirit of the Constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind."

See also *Daniel* v. *Simms,* 49 W. Va. 554, Point 6 of Syllabus, and *Richmond* v. *Drewery-Hughes Company,* 122 Va. 178, 193; 94 S. E. 989, 992.

Appellee's Entire Argument May Be Resolved Into an Objection to the Rates of the Tax in Question

Appellee's brief throughout, in discussing the alleged constitutional questions of equal protection of the laws and due process of law, may be resolved into the single question of the rate of the tax on its chain of bulk plants and filling stations.

Appellee (Brief, 24) admits that its system is a chain. Appellee refers to several references in the opinions of the district court to the effect that the tax here in question rests only on the number of stores in the chain (Appellee's Brief, pages 20, 21, 56) and observes (Appellee's Brief, page 80): "In determining the validity of a classified tax, the ground work of facts is controlling. This is a practical rule, indicating that a tax classification must bear some reasonable relation to some *taxable quality,* and it is the direct antithesis of the statement in the answer that to justify the tax the court need look no further, once it determines that the taxpayer is taking advantage of the opportunity of engaging in the 'store business'." (Italics ours).

When appellee refers to the classification in the act in question as being based solely, or only, on the number of stores in the chain as a basis of classification, appellee overlooks—as did the lower court—the fact that this Court, the Supreme Court of the United States, has held in the *Jackson* and *Liggett* cases, as well as in the *Great A. & P.* v. *Morrissett* and the *Great A. & P.* v. *Maxwell* cases, that the chain method of merchandising is, in itself, a taxable quality, so that we have here presented, not the single taxable quality of numbers, but the taxable

quality of numbers, the taxable quality of the chain method of business, and the taxable quality of the utilization here by appellee of all of the factors considered in the *Jackson* case, or their reasonable equivalents, in distinguishing the chain method of merchandising from the methods of individual merchants. (See comparison of advantages discussed in the *Jackson* case with advantages with the case at hand in appellant's original brief, pp. 29 to 32, inclusive.)

In appellee's "Summary of Argument," brief, page 11, clause B-2, appellee charges arbitrary and discriminatory *rates* of taxation without rational relationship to the value of the privilege subjected to the tax. In appellee's brief, pages 15 and 16, appellee attempts to distinguish the case at bar from the *Jackson, Liggett,* and other chain store cases by the fact that the maximum rate in the *Jackson* case was $25, while in the case at bar it is $250. In the outline of points relied upon by appellant, (Brief, page 23) appellee contends that "The company asserts that an academic discussion of classification without consideration of the rates and the graduation of the rates is an argument in *vacuo.*" And, on page 24 appellee states, in reply to the contention of appellant that appellee has not shown the tax to be confiscatory, "The ready answer to this is that confiscation is not an essential element of discrimination, but, answering the argument factually, the record does show that the tax attempted to be imposed confiscates the entire earnings of appellee's stations, and as to the other oil companies paying the highest rate, the tax is a capital levy." Thus appellee apparently takes a change of position on confiscation and attempts to convert confiscation into discrimination and then resolves the question of discrimination into one of classification. Obviously, the act in question operates equally and

uniformly as to all persons similarly circumstanced, as was pointed out in the *Jackson* case.

Again appellee (Brief, page 37) complains that the tax is a prohibitive exaction upon the five distributing companies falling within the highest bracket of the tax.

Appellee (Brief, page 8) points out that individual dealers paying a tax of $2.50 may do a larger volume of business than some of appellee's stations paying an average of $240, and (pages 72 and 73) sets forth various competitive stations doing approximately the same amount of business in which some stations pay only $2.50 while appellee pays $239.45; and shows certain other company stations selling slightly more than seventy thousand gallons of motor fuel per year with profits averaging $380 each, compared with Fort Defiance Service Station selling approximately the same amount of gasoline with net profits of $881.57, but does not show why, from the sale of the same quantity of gasoline, the Fort Defiance Station is enabled to make more than double the average profit shown by appellee for its own stations. The suggestions of these comparisons were fully answered in the *Jackson* case in which the plaintiff there paid taxes of $5,443.00 and had gross sales of approximately $1,000,000.00 while two department stores in Indianapolis paid $3.00 each and had gross sales amounting to approximately $8,000,000.00 each. Such questions have been put at rest by the decisions in the *Jackson* and *Liggett* cases.

Again, appellee (Brief, pages 60, 68, 69) complains that the graduation of rates of the tax in question is not sufficiently moderate, as though to suggest that if there were a lesser increase than $100 in going from the fiftieth to the seventy-fifth store, and less than $50 in going from the seventy-fifth store to all additional stores, the tax might be unobjectionable.

In comparison with the basis of graduation involved in the case at bar—which it is submitted is a legislative question—for purposes of illustration, the plan of progression followed in the South Carolina chain store statute (*Southern Grocery Stores* v. *South Carolina Tax Commission,* 55 Fed. (2d) 931) may be considered. There, instead of grouping various classes of stores according to numbers, the South Carolina legislature added $5 to the tax for each store, that is $5 on the first store and $5 additional for each additional store until the tax for the thirtieth store was $150; and, not increasing so rapidly as in the South Carolina case, let us suppose in the case at bar the tax for one store was $1, for the second store, $2, for the third store, $3, and so on until the one-thousandth store became $1,000, could it be said that the progression was not sufficiently moderate? Nevertheless, on that basis appellee, instead of paying $240,173.50 would have paid approximately $480,000. Reduce the scale still further and put a tax of 50¢ on the first store, $1 on the second store, $1.50 on the third store, and so on until the thousandth store is reached and appellee would still pay substantially the same figure as that required by the act here under consideration. Could it then be considered that the graduation was too sharp? This Honorable Court has held in the case of *Liggett* v. *Lee,* 288 U. S. 517, at page 533:

> "The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chain cannot be condemned as arbitrary."

Very plainly, all questions urged by appellee in its brief have been determined adversely to appellee by previous decisions of this Court in chain store cases. The only difference is that the tax here is a little higher

than the taxes considered in other cases. If the tax here were measured in dimes rather than in dollars, probably appellee would never have thought to complain or to question the constitutionality of the act. Wherefore, the observation of this Court in the case of *A. Magnano Company* v. *Hamilton, Attorney General,* 291 U. S. ---; 78 L. Ed. (Adv.) 712, 716, is exceedingly pertinent, wherein it was said:

> "If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act."

The Opinions of the Court Below

Appellee in its brief has repeatedly and at length quoted from the opinions of the district court. It is for the purpose of preventing that decision from becoming a precedent that appellant has respectfully and with deference to that court, sought this appeal. So far as the opinions of the lower court relate to the constitutional questions of equal protection and due process, it is believed that they utterly disregard the decisions of this Court in the previous chain store cases. So far as one of the opinions relates to the question of whether filling stations are stores within the meaning of the West

Virginia chain store statute, while the opinion presents in a very interesting manner (R. 271) various considerations which might well influence legislative policy, and which probably the West Virginia Legislature fully considered, it contains no reasoning or reference to precedent which is very persuasive that the legislature in this instance did not intend to and did not, in fact, include filling stations within the definition of "store" adopted by the legislature.

Questions Under the State Constitution

Inasmuch as in the court below appellee insisted that the act was violative of the equality-and-uniformity provision and the due-process provision of the West Virginia Constitution irrespective of its validity under the Federal Constitution, appellant devoted a considerable part of his original brief to the showing that the same principles were applicable in determining constitutionality under the State Constitution as were applicable in determining constitutionality under the Fourteenth Amendment to the Federal Constitution. Since appellee (Brief, 137) recognizes the force of this position, appellant is quite willing that the questions of state constitutionality be governed by the determination of the supposed federal questions.

In appellant's original brief (page 82) the case of *Laing* v. *Fox* (West Virginia, 1934) was referred to as "Not yet reported." The case is now reported in 175 S. E. (Adv.) 354, and was so noted in the index in the original brief.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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October 12, 1934.